



**IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE**

MISCELLANEOUS CIVIL APPLICATION NO. 05 OF 2024

(Being Judicial Review No. 23 of 2025, High Court, Lilongwe Registry)

BETWEEN:

THE STATE (On the Application of

THAWALE MINING LIMITED).....APPLICANT

AND

THE DIRECTOR GENERAL OF MINING AND

MINERALS REGULATORY AUTHORITY.....1ST RESPONDENT

MINING AND MINERALS REGULATORY

AUTHORITY.....2ND RESPONDENT

KHATHO CIVILS (PVT) LIMITED.....INTERESTED PARTY

CORAM: THE HON. JUSTICE MR S.S. KALEMBERA SC JA

: Mr J. Luwa, of Counsel for the Applicant

: Mr Chiume, of Counsel for the Respondents

: Miss Aisha Banda, of Counsel for the Respondents

: Mr Kadzipatike, of Counsel for the Interested Party

: Mr Chinkono, Recording Officer

: Mr Kachingwe, Recording Officer

RULING

Kalembura J

1. Introduction

This is the Court's Ruling on the Interested Party's application for an order discharging the Order of stay of execution of the judgment of the Court below pending appeal/cross-appeal, which was granted by this Court to the Applicant, on the 6th day of November 2025. The application is supported by an affidavit sworn by George Jivason Kadzipatike, of Counsel for the Interested Party as well as skeletal arguments. The Applicant opposes this application, and filed an affidavit in opposition sworn by Jefferson Luwa, of Counsel for the Applicant, and skeletal arguments.

2. Factual Background

The facts of the case remain as before. The case originates from a dispute over mining rights at Kanyenyeva Hill in Salima District. The factual backdrop, according to applicant is that the applicant, Thawale Mining, Limited held an exploration license for the site and had completed all necessary steps, including the Environmental & Social Impact Assessment (ESIA), to be granted a mining license. They were in the process of applying for this mining license when the regulatory authority made a decision in favour of another company, Khatho Civils (Pvt). Limited

The 1st and 2nd respondents granted permission to the interested party, Khato Civils (Pty) Limited, to carry out mining operations at the same site via a letter dated 17 March 2025. The applicant contends this decision was unlawful because Khato Civils does not possess a valid mining license. Further, the applicant contends the decision was made by the respondents before the names of their Board of Directors were officially published in the gazette, rendering the decision *ultra vires* and *void ab initio*.

The High Court initially granted the applicant permission for judicial review and an interlocutory injunction on 12 May 2025, restraining the respondents from allowing Khato Civils to mine at the site. However, on 4 June 2025, the High Court, upon application by Khato Civils, discharged the injunction. Crucially, the Court below found that the applicant had not suppressed material facts and that there were serious,

triable issues for the judicial review. However, it discharged the injunction on the basis that the applicant could be adequately compensated in damages and that the balance of convenience favoured Khato Civils due to its involvement in the critical Salima-Lilongwe Water Project.

The applicant then applied for a stay of this discharge order on 11 June 2025, which the same High Court judge refused. On 19 June 2025, the same judge granted an application for stay filed by Khato Civils, which is seeking to appeal the part of the 4 June ruling that found the applicant had sufficient interest. This sequence of events led the Applicant to file the said application for stay of enforcement or suspension of the High Court's Order dated 4 June 2025 pending appeal and/or intended cross-appeal, in this Court. This Court granted the said application on 6th day of November 2026.

The Interested Party having withdrawn their appeal have now approached this Court, that as a consequence thereof, the said Order of Stay dated 6th November 2025 ought to be discharged. The Applicant disputes that.

3. The Interested Party's Case

It is the Interested Party's case as deponed by Counsel Kadzipatike that being dissatisfied with the decision of the Court below dated 4th June 2025, wherein it was held *inter alia* that the Applicant has *locus standi* to maintain and prosecute its Judicial Review proceedings, the Interested Party filed an appeal before this Honourable Court on 17th June 2025. That on 15th June 2025, the Applicant filed a Notice of Intention to Contend that the judgment of the Court below be varied. It has further been deponed that on 6th November 2025, the Applicant obtained an Order of stay of execution of the said judgment of the Court below pending the determination of its intended cross-appeal.

It is further deponed that the Applicant did not file a cross-appeal but only filed a Notice of Intention to contend that the judgment of the Court below be varied, and that such a process could only stand with the appeal that the Interested Party filed. That once the Interested Party withdraws its appeal, the Applicant's Notice of Intention to contend that the judgment of the Court below be varied will also fall away automatically, as this Court substantially deals with appeals only. That the

Applicant having withdrawn its appeal, the Applicant's Order of stay of execution has no legs to stand on and it should be discharged.

4. The Applicant's Case

It is the Applicant's case as deponed by Counsel Luwa that any appellate process including cross-appeal would only be filed in this Court once the Registrar of the High Court has filed a Record of Appeal which has not been filed until the day on which the Appellant (Interested Party) did withdraw its appeal. That it is not a fact as alleged by the Interested Party that the Applicant only filed a Notice of Intention to contend that the judgment of the Court below be varied to suggest that the Applicant did not file an appeal and that only the Interested Party did. That it is a fact that the withdrawal of the appeal by the Interested Party does not automatically make the cross-appeal fail or fall away because it is a fact that a withdrawn appeal is deemed as a dismissed appeal such that the dismissal of the Interested Party's appeal invariably means the success of the Applicant's cross-appeal.

It has further been deponed that the correct factual position is that a dismissed appeal does not extinguish the operation or authoritative nature of an order granted by the Court to an opposing party along the way of the appellate process just as the Court did with an order of stay granted to the Applicant on 6th November 2025. That the Judicial Review proceedings are still alive in the Court below such that continuing the order of stay until the final disposal of the Judicial Review process would be a fair administration of justice. That discharging the order of stay as granted on 6th November 2025 would essentially mean allowing the Interested Party to continue carrying out mining activities without license and could essentially negate the very challenge or essence of the Judicial Review in the Court below.

5. The Respondents' Case

It is the Respondents' case as deponed by Miss Aisha Banda, of Counsel for Respondents, that they agree with the Interested Party's position that. The Application herein will render the Application for Stay Order irrelevant and moot, as such the Stay Order should be discharged in its entirety with costs to the Respondents.

6. Issues for the Court's Determination

The main issue for the Court's determination is whether following the withdrawal of the Interested Party's appeal, the order of stay dated 6th November 2025 be discharged.

7. Law and Analysis

Does this Court have jurisdiction to hear and determine the application before it?

Section 7 of the Supreme Court of Appeal Act provides as follows:

"A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal.

Provided that –

- (a) In criminal matters, if a single member refuses an application for the exercise of any such power, the applicant shall be entitled to have his application determined by the Court;*
- (b) in civil matters, any order, direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court."*

The application to discharge an order of stay which is before this Court would therefore only come before the full Bench if it involved the hearing or determination of the substantive appeal herein. Hence this court has the jurisdiction and determine the said application, it not being concerned with the hearing or determination of an appeal.

What is the effect of the Interested Party's withdrawal of its appeal?

The parties are of differing opinions as to the effect of the Interested Party's withdrawal of its appeal in relation to the Applicant's Intention to contend that the judgment of the Court below be varied/purported cross-appeal, and the sustenance or not of the order of stay of 6th November 2025. Counsels for the Interested Party and the Respondents submit that as a consequence of the Interested Party's withdrawal of its appeal, the Stay Order has no grounds to stand on. Counsel for the Interested Party has strongly argued that the Applicant only filed a Notice of Intention to contend that the judgment of the Court below be varied. Counsel for the Applicant, relying on Order III, r. 13 of the Supreme Court of Appeal Rules, contends that the filing of the Notice of Intention to contend as a cross-appeal can

only be filed in this Court once the Registrar of the High Court has filed a Record of Appeal. In other words the Applicant could only have its Notice of Intention to Contend mature into a cross-appeal once the appeal has been entered in this Court and not before.

Counsel for the Applicant seem to agree, in fact agrees, as paragraph 4 of Applicant's affidavit in opposition depones, with that position in so far as it relates to what point the Notice to Contend, which they filed, matures into a cross appeal. Clearly, the withdrawal of an appeal and its effects, as both all the parties agree, are governed by Order III, r.15 of the Rules of the Supreme Court which provides as follows:

- (1) An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file a notice with the Registrar to the effect that he does not intend further to prosecute the appeal.*
- (2) If all parties to the appeal consent to the withdrawal of the appeal without order of the Court, the appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the Registrar. In such event any sum lodged in Court as security for the costs of the appeal shall be paid out to the appellant.*
- (3) The withdrawal of an appeal with the consent of the parties under sub rule (2) shall be a bar to further proceedings on any application made by the respondent under rule 13 of this Order.*
- (4) If all the parties do not consent to the withdrawal of the appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, including any application made by the respondent under rule 13 of this Order, and for the making of an order as to the disposal of any sum lodged in Court as security for the costs of appeal.*
- (5) An appeal which has been withdrawn under this rule. Whether with or without an order of the Court. shall be deemed to have been dismissed.*

Counsel for the Applicant as earlier observed, contends that the effect of the withdrawal per Order III, r.15 (5) is that the appeal is dismissed. Further, that according to Order III, r.15 (4) the withdrawal of the appeal does not extinguish the

rights of the Respondent to the appeal, and that the cross-appeal survives and that the Respondent can proceed to prosecute his cross-appeal. I must state that the Applicant's contentions [presupposes that the appeal and intended cross-appeal have been entered in this court, and not like a situation we have in this matter, where the initial appeal as well as the intended cross-appeal have not been entered in this Court. On the other hand the Interested party's position is that there being no appeal, the cross-appeal lacks legs to stand on.

I am mindful that the application before the court is for the discharge of the order of stay granted by this court on 6th November 2025. It was granted pending determination of the Applicant's intended cross-appeal or until further order of this Court. I am further mindful that the main appeal has been withdrawn before it was even entered in this court, hence before the intended cross-appeal was entered in this court. I am further mindful that where necessary, this court, when considering whether to exercise its discretion to discharge the stay or not, certain established considerations must still come into play. When this Court hears an application for a stay, one of the considerations is the likelihood of the appeal succeeding. In **Mulli Brother Ltd v Malawi Savings Bank Ltd** (MSCA Civil Appeal Nos. 48 of 2014) [2015] MWSC 467 (15 July 2015) this Court said:

'It indicates that there is no necessary requirement that the Court determines whether there is an arguable case on the appeal although it may be relevant in determining whether it is appropriate to grant a stay. This is the case as in the present legal climate, where legal practitioners have an obligation not to bring proceedings that do not have reasonable prospects of success. Thus, this particular consideration may be one that the courts can approach with less scrutiny. It will depend upon the circumstances of the particular case. The court will always be concerned to ensure that its processes are not used inappropriately, for example, by permitting a defendant from keeping a successful plaintiff out of the fruits of his/her litigation victory by seeking a stay in respect of a hopeless appeal. The primary consideration in the court's determination will be whether the applicant for the stay has discharged the onus of demonstrating that there is a proper basis for the stay. Hence, the question that has exercised (or should exercise) our mind is whether there are reasonable prospects of success of the appeal lodged by the appellant. We find and

conclude that the answer to this question is in the negative. ' (Emphasis supplied)

This consideration presupposes that there is an appeal or cross-appeal, whatever the case might be, which has a likelihood of success. In the matter at hand there is no appeal from the Interested party which initiated this appellate process. What remains, if at all, is the intended cross-appeal. The Applicant was anticipating, to argue its intended cross-appeal at the hearing of the Interested Party's appeal. Hence, the intended cross-appeal was premised on there being an appeal by the Interested Party. And as both parties agree, the initial appeal as well as the intended appeal were never entered into this Court. As it stands, therefore, is there a cross-appeal before this court?

In *Mhango vs Blantyre Land and Estate Agency Limited* 10 MLR 55 (SCA) Banda JA had this to say:

"It is in the discretion of the court whether or not to stay execution. The general rule for the exercise of the judicial discretion is that where the right of appeal exists, the court ought to exercise its best discretion in a way so as to prevent the appeal, if successful, from being nugatory. We are also aware, however, of the rule that courts ought not "to make a practice of depriving a successful litigant of the fruits of his litigation": see The Annot Lyle (1886) 11 P.D. 114."

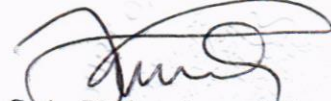
The discretion that this Honourable Court has in determining whether or not to grant the stay order, or indeed to vacate it, must be exercised judiciously. This means that there must be grounds, facts or evidence upon which the stay order should be granted or maintained. In the matter at hand I am inclined to agree with Counsel for the Interested Party, that in the circumstances of this case, that is, the initial appeal having been withdrawn before it was entered in this Court, and the intended cross appeal also having not yet entered in this Court, it cannot stand as an appeal on its own without the Applicant triggering the necessary processes required under Order III, r. 16 of the Rules of the Supreme Court.

8. Conclusion

Having considered the application before this Court, and all the circumstances of this case, especially, the fact that both the initial appeal and intended cross-appeal

were never entered in this Court, the Court finds that the withdrawal of the initial appeal renders the maintenance of the stay order of 6th November 2025 untenable. Consequently the Court grants the Interested Party's application and discharges the said order of stay dated 6th November 2025. Each party must bear its own costs.

MADE this 10th day of August, 2026 at Blantyre.



S.A. Kalembera SC

JUSTICE OF APPEAL